

HOMER D. MEEDS

IBLA 76-352

Decided August 26, 1976

Appeal from decision of Oregon State Office dismissing protest of closure of right-of-way Oregon 015245.

Set aside and remanded.

1. Rights-of-Way: Generally -- Rights-of-Way: Applications

The Act of July 26, 1866, R.S. 2477, 43 U.S.C. § 932 (1970), grants a right-of-way for the construction of highways over public lands not reserved for public uses. Where the Bureau of Land Management closes a 400-foot haul road, formerly part of a right-of-way issued to the Oregon State Highway Department on Oregon and California revested land for a material site, without considering the implications of the statute, and appellant submits evidence showing that

the road has been used by the public for many years, the decision will be set aside and the case will be remanded for a determination of whether a highway has already been established under the statute or, if not, to afford appellant an opportunity to file an application for a right-of-way under 43 CFR 2822.1-2.

APPEARANCES: Homer D. Meeds, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Homer D. Meeds appeals from a decision of the Oregon State Office, Bureau of Land Management, dated October 21, 1975, dismissing his protest to BLM's closing of a haul road previously used by the State of Oregon in connection with its right-of-way (Oregon 015245) for a material source.

The tract involved is Oregon and California Railroad (O & C) revested grant land. Previously the land was situated in the Rogue River National Forest, and the Forest Service had issued the Oregon State Highway Department a permit to use the land as a source of material and to construct a road from the nearest public road to the pit site. Presumably, the haul road was constructed in the late 1940's or early 1950's. The land then came

under the jurisdiction of the Bureau of Land Management (BLM) through an exchange with the Forest Service. On November 5, 1964, the BLM issued the Oregon State Highway Department a grant of right-of-way over public lands for a material source and access road.

The strategic location of the road makes it important to the local residents. The road, approximately 400 feet in length, abuts Longanecker Road and forms a shortcut across Poorman's Creek from Forest Creek Road (county road) to Medford-Provolt Highway (State Highway 238). The alternative route increases the travel distance between Forest Creek Road and Highway 238 by 1.4 miles or 2.8 miles round trip.

One resident complained to the State about the noise and dust created by vehicles using the crossing, and the State responded by blocking the road. A controversy arose between those who wish to use the road and those who wish to have the alleged nuisance abated.

In an effort to keep the road open to the public, 38 residents signed a petition dated November 25, 1974, requesting that the county declare the road to be a public road under the provisions of OR. REV. STAT. §§ 376.105 through 376.125, "Statutory Ways of Necessity." By letter of December 10, 1974, Robert J. Carstensen,

Director of Public Works, denied the petition on the grounds that the "Ways of Necessity" statute does not apply in this case.

The State of Oregon requested that the BLM accept a partial relinquishment of the right-of-way to cover the access road leading to the site.

As a prerequisite to accepting the relinquishment, the Bureau required the State to:

1. extend both ends of the existing road block that is north of Poorman's Creek;
2. remove the culvert in Poorman's Creek and dispose of the culvert;
3. construct a 5-foot high road block near the south end of the BLM property that is south of Poorman's Creek;
4. place metal reflective site posts between Longanecker Road and the south road block;
5. explore the possibility of erecting a "Dead End" sign at the junction of Longanecker Road and Highway 238. 1/

The State complied with these conditions and the Bureau accepted the partial relinquishment on September 9, 1975.

1/ These conditions were set forth in a letter of August 20, 1975, from Donald J. Schofield, Medford District Manager, to George Thornton of the Oregon State Highway Division.

On September 30, 1975, Homer D. Meeds wrote to the Medford District Manager, BLM, stating in part:

I wish to appeal your decision to close the portion of Bureau of Land Management road that abuts Longanecker Road and Forest Creek Jackson County Road in T. 38 R. 3 W. Sect. 14, of Jackson County.

The Chief, Branch of Lands and Mineral Operations, Oregon State Office, BLM, responded on October 21, 1975, with a letter decision dismissing Meed's protest. He explained that blocking the road was a prerequisite to accepting the State's relinquishment for the portion of land on which the haul road was constructed and cited 43 CFR 2801.1-5(i), which provides:

That upon revocation or termination of the right-of-way, unless the requirement is waived in writing, he shall, so far as it is reasonably possible to do so, restore the land to its original condition to the entire satisfaction of the superintendent in charge.

He further stated that the reason BLM required the State to block the road was because BLM has no present or future need of the road. He said that the grant of the right-of-way to the State neither stated nor implied that the road was to be open to the public. Since the county has no apparent interest in the road, as it rejected the petition of the residents, and since the BLM has no need for the

road and sees no reason to accept liability for maintenance and unforeseen accidents, the Oregon State Office dismissed the protest.

Meeds appealed. The main thrust of his statement of reasons relates to the use of this road by residents of the community and their alleged right to keep it open. The statement of reasons was accompanied by histories of the road compiled by some of the residents. The main points are as follows.

The old road, which has now been closed by BLM, was the original pack trail and wagon road through the mining settlement of Logtown to the mines on Jackass Creek when Oregon was still a territory in the early 1850's. 2/ The land encompassing a portion of the road was patented to a homesteader, John McKee, on December 13, 1878. Although the property has changed owners, the road across this land has always been acknowledged as a public road and was traveled all year as a shortcut between Forest Creek road and Highway 238. The present county road was built in 1871, and prior to that time, the old road was the only road to the mines and ranches on Jackass Creek, as it was known then. 3/ Early maps submitted by appellant show the road. The creek crossing is in almost the exact location it was 100 years ago.

2/ It appears that because of realignment the original road may not have been in the exact location as the haul road along its entire length but was in close proximity to it. However, both segments have been closed and access barred by BLM order.

3/ Presumably Jackass Creek was later named Poorman's Creek, but this is not absolutely clear.

During the 1920's, 1930's and 1940's the area was within the boundaries of the Rogue River National Forest. Maps made during this period show the road as a secondary public road. Some residents can remember the county grader grading the road.

In 1941, Stearns and Owens dredge-mined along the creek, but they continuously maintained a crossing and restored the area when they had completed their work.

In 1953 the State Highway Department purchased the resource rights to an unpatented mining claim from W. W. and Gertrude Winningham for a gravel stockpile site. A rock crusher was set up and put into operation. The creek crossing was reconstructed and the road across the flat was leveled and graded straight across to intersect with Highway 238. ^{4/} In addition to the highway gravel trucks, school buses, logging trucks, stockmen, residents and utility companies' service crews traveled the road regularly. The road is said to have been used as a school bus route from 1938 until about 1972, when the route was changed.

Administration of the Rogue River National Forest was terminated in 1954 and the land in question came under the jurisdiction of the BLM. Public use of the road continued.

^{4/} This is the haul road as it existed at the time the controversy originated.

In 1958 residents petitioned the State Highway Department to install a culvert in the creek crossing. The State responded that it had no authority to allow public use of the road. The County Court also refused them on the ground that funds were lacking.

In 1967 Paul Miller bought the deeded land which included part of the old McKee homestead and the site of old Logtown. He had it subdivided and set aside a 60-foot right-of-way, 600 feet along the existing road for public use. He named it Longanecker Road and he offered to donate the 60-foot right-of-way to the County, if it would agree to maintain it and straighten it to meet his legal survey. On November 26, 1967, John M. Black and other residents petitioned the County Court requesting that the entire length of the road, approximately 1,000 feet, be accepted into the permanent County Road system and improved for general use. The County Engineer responded that the County would not, or could not, maintain two branches of Forest Creek road.

During the next 7 years traffic increased on the road to such an extent that the State Highway Department erected a stop sign at the intersection of the road and Highway 238.

Two houses were built on Longanecker Road. Mr. Willard, whose house is within 400 feet of the creek crossing, complained to the

State Highway Department about the noise and dust created by the traffic using the road.

In October 1974 it was learned that the State Highway Department planned to install a gate across the end of Longanecker Road on the boundary of the gravel site to close the road to through traffic.

The residents filed a protest against the closing of the road with George Thornton, Highway Division Engineer in Medford, who advised them to petition the County Board of Commissioners. At this time, the petition signed by 38 residents was filed with the County Board of Commissioners seeking to have the road declared a "way of necessity." The petition was denied.

The gate was locked on January 13, 1975, with "Road Closed" signs erected on each side. That night Willard reported to the Sheriff's office that the gate had been vandalized. The next morning it was discovered that the gate had been sawed off with a chain saw and tossed over the bank. That day several residents driving across the road had flat tires on their vehicles from roofing nails on the road. Subsequently, highway crews filled the entrance to the road with a 6-foot bank of soil, effectively closing the road.

Another petition signed by more than 300 persons was filed with the Board of County Commissioners in March 1975. Commissioner Tom Moore organized a conference-type hearing on April 2, 1975, with representatives of the BLM, State Highway division, and Jackson County. Thornton announced that the State was relinquishing the portion of the right-of-way which encompassed the road and would remove the barrier if directed to do so by the BLM.

The Chief, Branch of Lands and Mineral Operations, BLM, sought the Solicitor's opinion concerning the effect of the relinquishment. The Solicitor, by letter dated July 3, 1975, responded that if the BLM accepts the relinquishment and leaves the road usable, it assumes responsibility for the road which would include sufficient maintenance to meet BLM safety standards. Liability would then result, he said. The Solicitor added that if it is determined to be in the public interest to have the road open but not maintained, the road should be clearly signed to the effect that it is dangerous and not maintained. He commented that this was not practical since the road would require regular maintenance because of flood damage from Poorman's Creek.

Permission was obtained from the County Director of Public Works to open the original part of the road up the hill on the

County right-of-way, by-passing the barrier. This by-pass was used throughout the summer of 1975, despite attempts by Willard to prevent the use. In September, the BLM District Manager requested the State to block the by-pass with another barrier of soil, thereby closing it to through traffic.

Appellant claims that the State or the BLM was required to give public notice of the closing of the road.

Appellant states that the closing of the road violates 43 CFR 2801.1-5(i), which provides that upon revocation or termination of a right-of-way the land shall be restored to its original condition. Appellant urges that maps prove that this was a well-traveled road at the time the State Highway Department realigned it. Also included with the appeal are "poll sheets", which are statements from the residents verifying that the road was in existence in the early 1900's.

Appellant points to practical considerations such as convenience, safety, fire protection and fuel conservation as reasons for keeping the road open. It is also asserted that the road closure channels trade away from the local stores at Ruch and Applegate. He emphasizes that no financial assistance is needed for maintaining the road.

Regarding appellant's contention that the State should have given notice prior to closing the road, this matter is one of State law and not within the jurisdiction of this Board. As to whether BLM was required to give notice, there is nothing in the regulations providing that the public must be put on notice when use of a road, which is part of a State's right-of-way over Federal land, is to be terminated in connection with the partial relinquishment of the right-of-way.

Under 43 CFR 2801.1-5(i) BLM may require that the road used in conjunction with the State's material site be blocked as a prerequisite to accepting the State's partial relinquishment of its right-of-way. If, however, it can be shown that the road is legally a public road and not merely an access road from which the State hauled gravel from its material site, the Bureau has no authority to interdict its use.

The Act of July 26, 1866, R.S. § 2477, 43 U.S.C. § 932 (1970), provides a possible means for this road to be a public highway. This section grants the right-of-way for the construction of highways over public lands not reserved for public uses. Under 43 U.S.C. § 932 (1970), it is necessary, in order that a road become a public highway, that it be established in accordance with the law of the state in which it is located. Ball v. Stephens, 68 Cal. App. 2d 843,

158 P.2d 207, 209 (1945). Referring to the law of the State, OR. REV. STAT. § 368.546 provides the following regarding grants:

* * * Whenever any person owning lands in any county, and not within the limits of an incorporated city or town, has dedicated or, after August 9, 1961, shall forever dedicate, to the use of the public for road purposes all or any portion of said land, by:

(1) Presenting to the county court a good and sufficient deed properly executed forever dedicating the land and granting such public road easement, and the deed has been or is accepted by the county court and placed of record; or

(2) Presenting to the county court for filing, as provided by law, any map or plat of any town, addition or subdivision dedicating to the use of the public for road purposes the highways, roads, streets, alleys or other public ways, shown thereon, and the map or plat has been or is approved and accepted by the county court or other public official and placed of record; each public road easement so dedicated shall be a public highway and road and shall be open to public use and travel.
[1961 c.556 § 1]

OR. REV. STAT. § 368.555, specifically dealing with a right-of-way over United States public land, provides:

* * * The county courts in their respective counties may accept the grant of rights of way for the construction of highways over public lands of the United States. Acceptance shall be by resolution of the court spread upon the records of its proceedings. This section does not invalidate the acceptance of such grant by general public use and enjoyment. [Emphasis added.] [Amended by 1967 c.256 § 1.]

This provision, then, sanctions use and enjoyment by the public as a means of acceptance of the Federal Government's grant under 43 U.S.C. § 932 (1970). Likewise, a review of Oregon case law reveals that Oregon courts have, for many years, deemed public user of a road to be a proper mode of accepting offers of a right-of-way for the construction of a highway over public lands. In Montgomery v. Somers, 50 Or. 259, 90 P. 674, 677 (1907), the Supreme Court of Oregon stated:

The act of Congress [43 U.S.C. § 932] referred to by the court is an express dedication of a right of way, and an acceptance of the grant, while the land is a part of the public domain, may be effected by public user alone, without any action on the part of the public highway authorities. When an acceptance thereof has once been made, the highway is legally established, and is thereafter a public easement upon the land, and subsequent entrymen and claimants take subject to such easement. *Wallowa County v. Wade*, 43 Or. 253, 72 Pac. 793; *McRose v. Bottyer*, 81 Cal. 122, 22 Pac. 393; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858.

Regarding the duration of the user the Court explained at 677:

* * * When the general public enter upon public lands not reserved for public use, for the purpose of appropriating a definite portion thereof for a highway, or to lay out or construct a highway for public use, they do so with the consent of the owner previously given by express dedication. Under such circumstances, the duration of the user is not material, so long as it is sufficient to clearly assert an intention on the part of the general public to make such appropriation; * * *.

Appellant has presented evidence of use since the early 1900's. The 1908 and 1954 U.S. Geological Survey maps, the 1932 Metsker map and the 1952 State Highway Department aerial survey photo, all show the road and bolster appellant's contention that the road has been recognized as a public one for many years. BLM denies that the road has a long history of use. It claims that the old original mining road is not being used and that the haul road's use only dates back to the State's material site in the 1950's. In light of the Court's interpretation of duration, in Montgomery v. Somers, supra, BLM's argument that the road does not have a long history of use loses significance. It is interesting to note that the State did acknowledge the use of the road by the public when it erected a traffic stop sign at the intersection of the road and State Highway 238. Also, the county has used the road as a bus route.

43 U.S.C. § 932 (1970) applies only to lands that are not reserved for public use, and there is nothing in the file to indicate that the land in question is presently so reserved. The land is O & C revested land and the Act of June 9, 1916, 39 Stat. 218, 219, section 2 states in pertinent part that:

* * * all the general laws of the United States now existing or hereafter enacted relating to the granting of rights of way over or permits for the use of public lands shall be applicable to all lands title to which

is revested in the United States under the provisions of this Act. * * *

Therefore, 43 U.S.C. § 932 (1970) is applicable to O & C land.

Ordinarily, no application need be filed under section 932 as no action on the part of the Government is necessary. 43 CFR 2822.1-1; United States v. 9,947.71 Acres of Land, 220 F. Supp. 328 (D. Nev. 1963). However a right-of-way for a highway over revested land is currently an exception to this general rule, and now an applicant must file an application and comply with 43 CFR 2822.1-2 if he wishes the route to become a public highway under section 932. This regulation reads in part as follows:

(a) Showing Required. * * * when a right-of-way is desired for the construction of a highway under R.S. 2477 over the Revested and Reconveyed Lands, an application should be made in accordance with § 2802.1. Such application should be accompanied by a map, drawn on tracing linen, with two print copies thereof, showing the location of the proposed highway with relation to the smallest legal subdivisions of the lands affected.

* * * * *

(c) Revested and Reconveyed Lands. Where Revested and Reconveyed Lands are involved, no rights to establish or construct the highway will be acquired by reason of the filing of such application unless and until the authorized officer of the Bureau of Land Management shall grant permission to construct the highway, subject to such terms and conditions as he deems

necessary for the adequate protection and utilization of the lands, and for the maintenance of the objectives of the act of August 28, 1937 (50 Stat. 874; 43 U.S.C. § 1181a).

It is noteworthy that the regulation which requires the filing of an application to acquire a right-of-way pursuant to 43 U.S.C. § 932 (1970) was first promulgated by publication in the Federal Register at page 2506 on April 12, 1957, as an amendment of 43 CFR 244.59 (since recodified). Insofar as we can ascertain, prior to that date such a right-of-way could be acquired on revested and reconveyed lands in the same manner as on any other unreserved public domain, i.e., by public acceptance and use.

The question thus arises whether the public had already acquired a right-of-way over this road prior to April 12, 1957. The evidence at hand suggests forcefully that it had done so. The alternative question is whether there is any current bar to the filing of an application to acquire the right-of-way in accordance with 43 CFR 2822.1-2. The record reveals repeated assertions by the Bureau of Land Management to the effect that it has no objection whatever to the continued use of the road by the public, the Bureau's concern being centered exclusively

on its liability for maintenance of the road and its exposure to tort liability. 5/

We recognize that the question of whether a road is a public highway is determined by the law of the State in which the public land is located. Therefore, this Department has considered State courts to be the proper forum to decide ultimately whether a public highway under 43 U.S.C. § 932 (1970) has been created under State law and to adjudicate the respective rights of interested parties. Alfred E. Koenig, A-30139 (November 25, 1964); Herb Penrose, A-29507 (July 26, 1963). Were this a case of a dispute between private citizens without the active involvement of any officer or agency of this Department, the resolution of the question would not be a matter of administrative concern, and we would be constrained to refer the appellant to his State court system.

But where, as in this case, the BLM has ordered the road closed to public use, and has dismissed a protest of that action, and the record shows that both the closure and the dismissal of the protest were ordered by the Bureau without any consideration having been given to the possible implications of the statute, it is appropriate that the Bureau review the propriety of its actions for its

5/ We are unable to identify such liability on a public right-of-way which has been created by statute.

own purposes and to ascertain whether it should either alter its position or receive and adjudicate an application under 43 CFR 2822.1-2.

In view of the fact that the Oregon State Office did not consider the implications of section 932 in making its decision, that decision will be set aside and the case remanded with instructions to consider first whether a public way has already been established under the statute and, if not, to afford the appellant and/or other applicants to file an application to establish such a public way in accordance with the regulation. A negative determination of either or both issues will be subject to a further appeal to this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to the Oregon State Office for further action consistent with this opinion.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge

